Supreme Court, U.S.
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No. 06-

IN THE SUPREME COURT OF THE UNITED STATES

LOUISE ELIZABETH HURST,
Petitioner

v.

TEXAS DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES, *ET AL*
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Texas waived its Eleventh Amendment immunity to suit in federal court by accepting federal funding to support its vocational Rehabilitation Program under Title I of the Rehabilitation Act, 29 U.S.C. § 701 - §796 which conditions States' receipt of federal funding on compliance with all conditions set out in the Program and specifically provides for judicial review of final decisions of "designated State units."

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioner:

Louise Elizabeth Hurst

Respondents:

Texas Department of Assistive and Rehabilitative Services ("DARS") (formerly known as the Texas Rehabilitation Commission);

Terry Murphy, Commissioner of the Texas Department of Assistive and Rehabilitative Services

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The court of appeals' decision is reported at 482 F.3d 809 (5th Cir. 2007) and reprinted in Appendix A (hereinafter "App."). The district court's decision is reported at 392 F. Supp.2d 794 (W.D. Tex. 2005) and reprinted in App. B. The Report and Recommendation of the United States Magistrate Judge (filed May 20, 2005) is reprinted in App. C.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on March 26, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). 28 U.S.C. 2403(a) may apply. The courts below did not certify to the Attorney General that fact that the constitutionality of an Act of Congress was drawn into question, pursuant to 28 U.S.C. 2403(a). Jurisdiction in the district court was asserted based on 28 U.S.C. §1331 (federal question), as well as the Rehabilitation Act, as amended, 29 U.S.C. §722. In addition, Petitioner relied upon 28 U.S.C. §2201, authorizing the court to grant declaratory relief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the Spending Clause, Art. 1, §8, cl. 1 of the United States Constitution, and Title I of the Rehabilitation Act, 29 U.S.C. § 701 - §796 are reprinted in App. D.

STATEMENT OF THE CASE

This Petition addresses the Fifth Circuit's ruling that the judicial review provision contained in the Vocational Rehabilitation Program set out in Title I of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 - §796, violates the

Eleventh Amendment of the U.S. Constitution. Other courts of appeals have reached the merits of these judicial review cases, thus de facto finding a waiver of immunity. The Fifth Circuit in this case recognized that the judicial review clause specifically applies to state units. Nevertheless, the appellate court incorrectly concluded that Section 102 of the Rehabilitation Act [29 U.S.C. §722] "does not contain the necessary 'clear statement' required under the *Dole* test for finding a waiver of Eleventh Amendment immunity under federal Spending Clause legislation." *Hurst v. DARS*, 482 F.3d 809, 814 (5th Cir. 2007); *South Dakota v. Dole,* 483 U.S. 203 (1987).

This raises an important question of federal law that has not been, but should be, settled by this Court. The federal Vocational Rehabilitation Program set out in Title I of the Rehabilitation Act (1) conditions receipt of federal funding on compliance with all conditions set out in the Program, 29 U.S.C. §721(b); (2) requires an opportunity for judicial review of adverse determinations in federal court, 29 U.S.C. §722 (c)(5)(J); and (3) specifically provides that only a "designated State unit" is a potential defendant in a suit for judicial review brought by an individual, 29 U.S.C. §722(c). If such statutory language does not satisfy the unambiguous intent requirement of *Dole*, then, it would appear that only statutes containing rote references to state sovereign immunity or the Eleventh Amendment would manifest the requisite unambiguity. Although this statute does not contain that rote language, its terms and structure nonetheless would leave no doubt in the mind of a responsible State official that to receive this federal funding "designated State units" are required to submit to federal court jurisdiction to review their final decisions.

A. District Court Ruling. Petitioner, Louise Elizabeth Hurst, filed this civil action in the Western District of Texas on November 21, 2003, to review the denial of vocational

rehabilitation services by the Texas Rehabilitation Commission (now the Texas Department of Assistive and Rehabilitative Services). The Defendants in the district court filed a motion to dismiss based on Eleventh Amendment immunity. Ms. Hurst responded that the State had specifically waived immunity to suit for judicial review under 29 U.S.C. §722 (c)(5)(J)(i) when it accepted federal funds provided through Title I of the Rehabilitation Act of 1973. The Magistrate Judge found that Ms. Hurst's claim under §722(c)(5)(J)(i) could go forward and recommended that DARS motion to dismiss be denied. DARS filed objections to the Magistrate's recommendation.

In a *de novo* review, the district court rejected the report and recommendation of the Magistrate in relevant part and granted DARS' motion to dismiss by an order entered on September 22, 2005. App. B.

Ms. Hurst appealed.

B. Court of Appeals Decision. On March 26, 2007, the Fifth Circuit affirmed the district court's dismissal of Ms. Hurst's suit for judicial review. *Hurst v. DARS*, 482 F.3d 809, 814 (5th Cir. 2007) (App. A). The court held that 29 U.S.C. §722 did not contain the necessary 'clear statement' that the State of Texas waived immunity if it accepted federal funds through the Vocational Rehabilitation Program and that Texas had not otherwise waived its immunity from suit. *Id.* The court of appeals recognized that, unlike the statute at issue in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which provided a federal court remedy for 'any recipient of federal assistance or federal provider of such assistance", the Rehabilitation Act "specifically makes acts by a 'designated State unit' subject to judicial review." *Id.* at 812-13. The court of appeals, nonetheless, held that the judicial review language at issue in this case is "indistinguishable" from the language

before the Court in *Atascadero*. *Id.* The court of appeals also distinguished this case from Fifth Circuit and Seventh Circuit cases that held that the structure of a statute could satisfy the "clear statement" requirement and provide "non-verbal" waiver of Eleventh Amendment immunity, reasoning that the statute in those cases involved federal preemption issues and that Title I of the Rehabilitation Act does not. *Id.* at 813-14.

REASONS FOR GRANTING THE PETITION

The judicial review provision at issue here provides:

> Any party aggrieved by a final decision . . . may bring a civil action for review of such decision. The action may be brought in any state court of competent jurisdiction *or in a district court of the United States of competent jurisdiction* without regard to the amount in controversy. (emphasis added.)

29 U.S.C. §722 (c)(5)(J)(i). Unlike similar judicial review provisions previously reviewed by this Court, this statute explicitly states that only decisions of a "designated State unit" are subject to this review. *See* 29 U.S.C. §722.

The Fifth Circuit's decision eviscerates the clear Congressional intent underlying the federal judicial review provisions of the Vocational Rehabilitation Program, set out in Title I of the Rehabilitation Act of 1973, as amended. The decision also is inconsistent with decisions of other United States courts of appeals that have reached the merits of judicial review cases. Moreover, it creates confusion concerning the Vocational Rehabilitation Program and the standard for determining waiver of Eleventh Amendment immunity through Spending Clause legislation. Supreme Court Rule 10(a).

This case also presents important questions about federal courts' jurisdiction to enforce provisions of federal law and state agencies' compliance with the statutory requirements of a federal Spending Clause program. These questions have not been resolved by this Court and should be. Supreme Court Rule 10(c).

The Fifth Circuit's decision in this case may further complicate, and, thus, cause confusion in, Eleventh Amendment jurisprudence. The Fifth Circuit, like the Seventh Circuit, found waiver of Eleventh Amendment immunity in the Federal Telecommunications Act of 1996, though it lacked explicit references to waiver and Eleventh Amendment immunity. *See AT&T Comm. v. Bellsouth Telecom.*, 238 F.3d 636, 646 - 647 (5th Cir. 2001), and *MCI Telecom. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 341 - 344 (7th Cir. 2000). In both the *AT&T* case and the *MCI* case the courts reasoned "Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity." *AT&T,* 238 F.3d at 645, *MCI,* 222 F.3d at 339. In both cases the appellate courts analyzed the structure of the statute at issue and held that it unambiguously conditioned receipt of funds on waiver of Eleventh Amendment immunity. *AT&T,* 238 F.3d at 646-47, *MCI,* 222 F.3d at 341.

In the case at bar, the Fifth Circuit distinguished its *AT&T* decision because the Telecommunications Act of 1996 involved federal preemption and Title I of the Rehabilitation Act does not. *Hurst v. DARS*, 482 F.3d at 813–14. Yet establishing one analysis for Spending Clause legislation that involves federal preemption and another for Spending Clause legislation that does not involve preemption further complicates an already complicated jurisprudence.[1]

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[1] Further confusing immunity jurisprudence is the fact that other circuit

This Court has not previously addressed this question because a statute that contains similar judicial review language to that found in Title I of the Rehabilitation Act has not previously reached this Court. The Court should resolve this important question of federal law and sustain Congress' intent that federal courts review States' compliance with the requirements of the federal Vocational Rehabilitation Program.

I. ELEVENTH AMENDMENT IMMUNITY IS NOT ABSOLUTE

The Eleventh Amendment to the U. S. Constitution, unless waived, bars suits against a state or one of its agencies or a state official in his official capacity when the real party in interest is the State:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

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courts of appeals are reaching the merits of judicial review cases pursuant to 29 U.S.C. §722, thus implicitly finding a waiver of immunity. *See Diamond v. Michigan*, 431 F.3d 262 (6th Cir. 2005), *Reaves v. Missouri Dept. of Elem. and Second. Educ.*, 422 F.3d 675 (8th Cir. 2005) (both deciding the merits of suits for judicial review pursuant to 29 U.S.C. §722); *see also Carrigan v. New York State Educ. Dept.*, 2007 U.S. Dist. LEXIS 42481 (N.D.N.Y. June 12, 2007). These differing approaches among the lower courts could create inconsistency among the circuits.

However, Eleventh Amendment immunity is not absolute. This Court has recognized that a state may waive its immunity by consenting to suit. *College Saving Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). One way a state may waive its Eleventh Amendment immunity is by accepting federal funds, provided through a statute Congress has enacted through the Spending Clause of the U.S. Constitution[2] that unambiguously requires waiver of the Eleventh Amendment immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (stating "A state may effectuate a waiver of its constitutional immunity by . . . waiving its immunity to suit in the context of a particular federal program . . ."). That is precisely what the Vocational Rehabilitation Program does.

II. WAIVER OF ELEVENTH AMENDMENT IMMUNITY BY ACCEPTING FEDERAL FUNDS

In *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court described the circumstances in which waiver of Eleventh Amendment immunity by acceptance of federal funds will be found. First, the federal expenditures must benefit the general welfare; second, the conditions imposed on the recipients must be unambiguous; third, the conditions must be reasonably related to the purpose of the expenditures; and fourth, no condition may violate any independent constitutional prohibition. *Id.* at 207-08. The *Dole* case also included a fifth requirement, that the condition may not be coercive. *Id.* Only the second requirement, the unambiguous conditions requirement, is in dispute in this case. *Hurst v. DARS*, 482

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[2] The Spending Clause provides that "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." Art. I, §8, cl. 1 of the U.S. Constitution.

F.3d 809, 811 (5th Cir. 2007).

This Court has held that a state waives its immunity by voluntarily participating in a federal spending program when a statute manifests a clear intent to condition participation in the program on a State's consent to waive Eleventh Amendment immunity. *Dole,* 483 U.S 203; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). *See also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (the opinion "does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment.") (Scalia, J. concurring).

Applying these principles to the federal Vocational Rehabilitation Program reveals that the judicial review provision in Title I of the Rehabilitation Act, are unambiguous and that to operate its rehabilitation program with federal funds Texas must have waived any claims to immunity. The terms and structure of the Rehabilitation Act leave no doubt that Congress intended states that received funds under the Act to waive Eleventh Amendment immunity to judicial review of final administrative decisions in vocational rehabilitation programs. In fact, the Respondents/Defendants obviously recognized this clarity because after the Act was amended in 1998 to add the judicial review provision at issue here, the agency amended its own regulations to provide for judicial review in federal court. *See* 24 TEX. REG. 1606 (Mar. 5, 1999) and 24 TEX. REG. 3111 (April 16, 1999). Significantly, the amendments to the state regulations were made "to conform the rules to the 1998 amendments to the Rehabilitation Act of 1973". *Id.*

Thus, the State of Texas received substantial funds in exchange for compliance with certain unambiguous federal

requirements, including federal court review of the actions of state entities. The conditions placed on receipt of the funds were clear and unambiguous to any reasonable person. There is no other rational interpretation. The rigid linguistic standards set by the Fifth Circuit in this case impose an unacceptable burden on the expression of legislative intent.

III. THE REHABILITATION ACT'S STRUCTURE ITSELF ESTABLISHES UNAMBIGUOUS INTENT TO WAIVE STATE'S IMMUNITY FROM SUIT

Title I of the Rehabilitation Act describes in detail the requirements of state vocational rehabilitation plans. 29 U.S.C. §721(a). It provides that any state plans that do not fulfill the specified conditions must be disapproved. 29 U.S.C. §721(b). And it details the procedures of mediation and administrative review that state vocational rehabilitation must have. 29 U.S.C. §722 (c). It provides that "[a]ny party aggrieved by a final decision [of a hearing officer or state reviewing official, as the case may be] described in subparagraph (I), may bring a civil action for review of such decision . . . in a district court of the United States of competent jurisdiction." 29 U.S.C. §722(c)(5)(J). Most significantly, the only entities within the class of potential defendants in a federal suit for judicial review under Title I are "designated State unit[s]." 29 U.S.C. §722(c).

Importantly, 29 U.S.C. §703 authorized advanced funding so states could establish and fund vocational rehabilitation programs. *See* 29 U.S.C. §703. *See* also 29 U.S.C. §720 (declaration of policy and authorization of appropriations), 29 U.S.C. §721 (detailed requirements for state plans to receive funding), and 29 U.S.C. §§730, 731

(allotments and payments to states). Title I of the Rehabilitation Act also established the Rehabilitation Services Administration to carry out the purposes of Title I, *see* 29 U.S.C. §702, including provision of consultative services, technical assistance, and training to programs authorized under Title I, *see* 29 U.S.C. §709, and an annual evaluation of vocational programs' effectiveness, *see* 29 U.S.C. §711. Thus, Title I of the Rehabilitation Act clearly conditions federal funding of state vocational rehabilitation programs on compliance with the requirements of 29 U.S.C. §722, including the requirement of judicial review of final decisions of "designated State unit[s]" as required by 29 U.S.C. §722(c).

Thus, Section 722 read in the context of the structure of Title I as a whole makes it unambiguously clear that state entities that accept federal funds under Title I are required to waive their Eleventh Amendment immunity and allow federal court jurisdiction for judicial review of their final decisions.

Thus, the case at bar does not present the situation that this Court faced in *Atascadero*. In *Atascadero*, this Court considered whether Title II of the Rehabilitation Act as it existed at that time satisfied the "clear statement" rule. The Court noted that the court of appeals decision it was reviewing (and would reverse) based its view on the fact that the Act provided remedies, procedures, and rights against "any recipient of Federal assistance" while the implementing regulations expressly defined the class of recipients to include the States." *Atascadero*, 473 U.S. 235, 237 (1985). Thus, at that time a federal agency, not Congress, had decided that states should be included within the class of defendants who could be sued under Section 504 of the Rehabilitation Act and state defendants were among myriad other potential defendants. In contrast, in the case at bar, the Act itself provides that the state entities receiving funds under the Act are the **only** defendants in a suit for judicial review. Thus, Title I

of the Rehabilitation Act provides a specific authorization of federal jurisdiction for a judicial review lawsuit against a State entity, not the general authorization for suit in federal court rejected in *Atascadero*. *See id.* at 246

This characteristic is also the crucial difference between Title I of the Rehabilitation Act, as amended, and the Education of the Handicapped Act (EHA) reviewed by this Court in *Dellmuth v. Muth*, 491 U.S. 223 (1989). In *Dellmuth*, this Court ruled that the structure of the EHA merely "lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference." *Id.* at 232. In stark contrast here, Congress expressly provided for judicial review of the actions of *state entities* as a condition for receiving federal funding. Thus, although the judicial review provision of the EHA at issue in *Dellmuth* was strikingly similar to 29 U.S.C. §722(c)(5)(J)(i), the differences in the structure of the two Acts lead to opposite conclusions: While the EHA only "len[t] force to [an] inference" that States were intended defendants, Title I of the Rehabilitation Act makes State entities the only intended defendants in a suit for judicial review.

This crucial difference is why the EHA judicial review provision was constitutionally ambiguous while the judicial review provision of Title I of the Rehabilitation Act is unambiguous. Although the issue in *Dellmuth* was whether the EHA abrogated Eleventh Amendment immunity and the case at bar concerns Spending Clause legislation, which require distinct analyses, both analyses require a statute to be unambiguous. In that respect they are similar. *See Atascadero*, 483 U.S. 203, 247 (after holding that statute lacks sufficient clarity to abrogate Eleventh Amendment immunity, Court holds it "likewise" fails to manifest clear intent to require

waiver under the Spending Clause).

In short, this case raises important questions of federal law that should be resolved by this Court.

CONCLUSION

Petitioner respectfully asks this Court to grant the petition for a writ of certiorari to resolve the important questions of federal law presented by this petition.

Respectfully submitted,

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